WAI YU-TSANG

v.

THE QUEEN

PRIVY COUNCIL (ON APPEAL FROM THE COURT OF APPEAL HONG KONG)
LORD GOFF OF CHIEVELEY
LORD BRIDGE OF HARWICH
LORD GRIFFITHS
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
[PRIVY COUNCIL APPEAL NO. 18 OF 1991]
14 OCTOBER 1991

CRIMINAL PROCEDURE: *Conspiracy to defraud - Dishonest concealing in the accounts - Dishonouring of US dollar cheques - Cheques purchased by the bank - Mental element - Whether the bank and its existing and potential shareholders, creditors and depositors defrauded.*

The appellant was the chief accountant of the Hang Lung Bank. The bank had purchased US dollar cheques amounting to US$124 million, an amount which exceeded the assets of the bank at that time. It was alleged that the appellant conspired with others to defraud the bank and its existing and potential shareholders, creditors and depositors, by dishonestly concealing in the bank's accounts, the dishonouring of the US dollar cheques in the sum of US$124 million.

The appellant did not report the dishonour of the cheques nor did he cause the dishonour to be recorded in the bank's computerised ledgers. The details of the transactions were recorded only in private ledgers. Instead there were records in the bank's accounts entries purporting to show that the bank had sold US dollar cheques to the total amount of the dishonoured cheques to Southseas Finance Co. Ltd. (SSF), which had paid for the drafts with cheques drawn on its own account and the accounts of two other companies. The drafts were never presented for payment, although the accounts were debited with the amounts of the cheques. This gave a false picture of the balances in the Chemical Bank account and in the SSF account.

The appellant was convicted of conspiracy to defraud. His appeal to the Court of Appeal was dismissed; hence this appeal.

The appellant's case was directed solely to the Judge's direction on the mental element required for a conspiracy to defraud.

Held:

[1] The appellant was, for his own purpose, dishonestly supplying the company with false information which persuaded it to accept risks which it would or might not have accepted if it had known the true facts.

[2] The Court cannot see why this was not an agreement to practice fraud on the company because it was a dishonest agreement to employ a deceit which imperilled the economic interests of the company.

[3] The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practice fraud on somebody. In this case the conspirators have dishonestly agreed to

bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put to risk. It is however important to distinguish a conspirator's intention dishonestly to bring about such a state of affairs from his motive.

[Appeal dismissed.]

Cases referred to:
R. v. Allsop [1976] 64 Cr App R 29 ***(foll)***
Welham v. DPP [1961] AC 103 ***(foll)***
Scott v. Metropolitan Police Commissioner [1975] AC 819 ***(foll)***
Hyam v. DPP [1975] AC 55 ***(cit)***
Cote v. R [1986] 25DLR (4th) 82

Legislation referred to:
Forgery Act 1913 [UK], s. 4(1)

Other source referred to:
East's Pleas of the Crown, Vol. 2, p. 852

For the appellant - Martin Wilson Q.C. & Barry Sceats, Hong Kong Bar
Solicitor for the appellant - Charles Russell
For the Crown - Clive Groseman; Deputy Crown Prosecutor, Hong Kong & Robert Lee, Crown Counsel, Hong Kong
Solicitor for the crown - Macfarlanes

JUDGMENT

Lord Goff of Chiveley:

The appellant, Wai Yu-tsang, appeals from a judgment of the Court of Appeal of Hong Kong dated 28 June 1990, dismissing his appeal against conviction on one count of conspiracy to defraud returned after trial in the High Court of Hong Kong before Barnett J and a jury.

The appellant was the chief accountant of the Hang Lung Bank (the bank). He was charged that, between 7 September and 13 November 1982, he conspired together with Cheng Eng-kuan, Lee Hoi-kwong and others to defraud the bank and its existing and potential shareholders, creditors and depositors, by dishonestly concealing in the account of the bank the dishonouring of US dollar cheques in the sum of US$124 million, drawn on the account of Overseas Maritime Co. Ltd. SA with Citibank International, Chicago, such cheques having been purchased by the bank. Of the other members of the alleged conspiracy, Cheng was the managing director of the bank and Lee was the general manager. Cheng fled the jurisdiction, as did another associate of his, John Mao. Lee originally stood trial with the appellant but, following preliminary argument on the admissibility of certain evidence, the crown abandoned its case against him. In the result, the appellant stood trial alone.

The events giving rise to the charge against the appellant were as follows. For some years a cheque kiting cycle, known as the Capri cycle, had been run by John Mao, using a number of companies as its principal vehicle. In May 1982, in order to bring the Capri cycle to an end, a new cheque kiting cycle (known as the OMC Cycle) was set up to create funds for Overseas Maritime Co. Ltd. SA (OMC). The object was to transfer the funds into the Capri cycle so that the final cheques in circulation in that cycle could be met. The bank purchased cheques in US currency *via* a company called Southseas Finance Co. Ltd. (SSF). The cheques, drawn on the OMC account, were purchased by the bank from SSF. The proceeds were credited to the account of SSF with the bank and the cheques were cleared through the bank's foreign exchange with Chemical Bank. Those purchases required the approval of Cheng

as the managing director of the bank. However on 7 September 1982 a rumour started by a taxi-driver caused a run on the bank, and in consequence Cheng gave instructions that no further US dollar cheques or draft were to be purchased. This had the effect that the second cheque kiting cycle was brought to a premature end, and that cheques then in circulation could not be met. On 14 September Chemical Bank advised the bank that two or three of the OMC cheques had been returned, and on 18 September another seven. The total face value of those cheques (which had been purchased by the bank from SSF) was US$124 million (the equivalent of HK$755 million), an amount which exceeded the assets of the bank at that time.

There was no suggestion that the appellant was in any way involved in either of the two cheque kiting cycles. It was however alleged that he conspired with Cheng and others to defraud the bank and its existing and potential shareholders, creditors and depositors, by dishonestly concealing in the bank's accounts the dishonouring of the US dollar cheques in the sum of US$124 million, which had been purchased by the bank. During the run on the bank, it had been supported by the Standard Chartered Bank to which the appellant was under a duty to report, as he was to the Commissioner of Banking. He did not however report the dishonour of the cheques, nor did he cause the dishonour to be recorded in the bank's computerised ledgers. The details of the transactions were recorded only in private ledgers, called "K" vouchers. Instead there were recorded in the bank's accounts entries purporting to show that the bank had drawn 16 US dollar drafts on Chemical Bank in amounts equivalent to the total amount of the dishonoured cheques, and had sold them to SSF; that short term loans had been granted to two companies called Thring Trading Ltd. (Thring) and Texas Finance Ltd. (Texas), and that SSF had paid for the drafts with cheques drawn on its own account and on the accounts of Thring and Texas.

The drafts were never presented for payment, although the accounts were debited with the amounts of the cheques. This gave the false picture of balances in the Chemical Bank account and in the SSF account which were approximately the same as they would have been if the dishonoured cheques had been recorded as debits in the SSF account and credits in the Chemical Bank account.

The case for the defence at the trial was that the appellant was acting under the instructions of Cheng; that the confidential system of accounting was created for the purpose of preventing junior staff at the bank from hearing of the dishonour and precipitating a second run on the bank; and that the appellant acted in the belief that the subsequent balancing transactions were *bona fide* and that he was acting in the best interests of the bank. The jury however returned a unanimous verdict of guilty after a trial which lasted for about five months. The appellant was sentenced to three years imprisonment.

Before the Court of Appeal, a number of issues were raised by the appellant founded upon criticisms of the summing up of the learned Judge. All of those criticisms were rejected by the Court of Appeal. Before their Lordships, however, the appellant's case was directed solely to the Judge's direction on the mental element required for a conspiracy to defraud. The Judge explained to the jury that the appellant must have been party to an agreement with one or more of the other named conspirators which had a common intention to defraud one or more of the persons or categories of persons named in the indictment. He explained that such an intention must involve dishonesty on the part of the conspirators, and continued as follows:

> It is fraud if it is proved that there was the dishonest taking of a risk which there was no right to take which - to Mr. Wai's knowledge at least - would cause detriment or prejudice to another, detriment or prejudice to the economic or proprietary rights of another.

> That detriment or prejudice to somebody else is very often incidental to the purpose of the fraudsman himself. The prime objective of fraudsmen is usually to gain some advantage for themselves, any detriment or prejudice to somebody else is often secondary to that objective but nonetheless is a contemplated or predictable outcome of what they do.
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> If the interests of some other person - the economic or proprietary interests of some other person are imperilled, that is sufficient to constitute fraud even though no loss is actually suffered and even though the fraudsman himself did not desire to bring about any loss.

It is plain that direction was founded upon the judgment of the Court of Appeal in *R. v. Allsop* [1976] 64 Cr. App. R. 29. It was the contention of the appellant that the direction was erroneous in so far as it stated that for this purpose, the imperilling of an economic interest or the threat of financial prejudice was sufficient to establish fraud, whatever the motive of the accused may have been; and that in so far as *Allsop* so decided, it was wrong and should not be followed.

In the course of argument, their Lordships were referred to a number of authorities as well as to *Allsop* itself. They do not however find it necessary for the present purposes to refer to more than a few of these authorities. The first is *Welham v. DPP* [1961] AC 103. That case was in fact concerned with forgery, and in particular with the meaning of the words 'intent to defraud' in s. 4(1) of the Forgery Act 1913. The case has however since been referred to as providing guidance in cases of conspiracy to defraud (see *Scott v. Metropolitan Police Commissioner* [1975] AC 819 at p. 838, per Viscount Dilhorne), a proposition with which their Lordships are respectfully in agreement. In *Welham,* the appellant had witnessed forged hire purchase agreements, on the basis of which finance companies advanced large sums of money. His defence was that he had no intention of depriving the finance companies by deceit of any economic advantage, his belief being that the only function of the agreements was to enable the companies to circumvent certain credit restrictions. His only purpose was to mislead the authority which might inspect the records and whose duty was to prevent contravention of the credit restrictions. The House of Lords held that there was no warrant for confining the words 'intent to defraud' to an intent to deprive a person by deceit of an economic advantage or to inflict upon him an economic loss, and further that such an intent could exist where there was no other intention than to deceive a person responsible for a public duty into doing something, or failing to do something, which he would not have done, or failed to have done, but for the deceit. Lord Denning, who delivered the leading speech, rejected the argument that an intention to defraud involves an intention to cause economic loss. He referred to opinions of academic lawyers to that effect, and said (at p. 131):

> I cannot agree with them on this. If a drug addict forges a doctor's prescription so as to enable him to get drugs from a chemist, he has, I should have thought, an intent to defraud, even though he intends to pay the chemist the full price and no one is a penny the worse off.

Later, Lord Denning referred to a passage in *East's Pleas of the Crown,* Vol. 2, p. 852, to the effect that forgery at common law denotes a false making - 'a making *malo animo*' - of any written instrument for the purpose of fraud and deceit. He then said (at p. 133):

> That was written in 1803, but it has been always accepted as authoritative. It seems to me to provide the key to the cases decided since it was written, as well as those before. The important thing about this definition is that it is not limited to the idea of economic loss, nor to the idea of depriving someone of something of value. It extends generally to **the purpose of fraud and deceit.** Put shortly, 'with intent to defraud' means 'with intent to practise a fraud' on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough.

Lord Radcliffe agreed with the speech of Lord Denning, but went on to express in his own words his view of the meaning of the words 'intent to defraud' in s. 4(1) of the Act of 1913. At p. 124, he rejected the proposition that in ordinary speech 'to defraud' is confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss, and continued:

> Has the law ever so confined it? In my opinion there is no warrant for saying that it has. What it has looked for in considering the effect of cheating upon another person and so in defining the criminal intent is the prejudice of that person: what Blackstone (*Commentaries*, 18th Edn., Vol. 4, at p. 247) called 'to the prejudice of another man's right'. East, *Pleas of the Crown* (1803), Vol. 2, at pp. 852, 854, makes the same point in the chapter on Forgery: 'in all cases of forgery, properly so called, it is immaterial whether any person be actually injured or not provided any may be prejudiced by it.

He went on to say that the special line of cases where the person deceived is a public authority or a person holding public office, and there is no intention on the part of the deceiver to inflict upon him any pecuniary or economic harm, shows that such an intention is not necessary to convict a man of an intention to defraud. The remainder of the Appellate committee agreed with both Lord Radcliffe and Lord Denning.

This authority establishes that the expression 'intent to defraud' is not to be given a narrow meaning, involving an intention to cause economic loss to another. In broad terms, it means simply an intention to practise a fraud on another, or an intention to act to the prejudice of another man's right.

Their Lordships turn next to *Scott v. Metropolitan Police Commissioner* [1975] AC 819. That case was concerned with a conspiracy temporarily to abstract films from a cinema to enable the appellant to make and distribute copies of the films on a commercial scale the operation being carried on without the consent of the owners of the copyright or distribution rights in the films. The appellant's argument was to the effect that he could not be guilty of any conspiracy, because the facts did not disclose an agreement to deceive the persons alleged to have been the object of the conspiracy. This argument was rejected by the House of Lords. The leading speech was delivered by Viscount Dilhorne, with whom the remainder of the appellate committee agreed. He reviewed the authorities, including *Welham*, and said (at p. 839):

> I have not the temerity to attempt an exhaustive definition of the meaning of 'defraud'. As I have said, words take colour from the context in which they are used, but the words 'fraudulently' and 'defraud' must ordinarily have a very similar meaning. If, as I think, and as the Criminal Law Revision Committee appears to have thought, 'fraudulently' means 'dishonestly', then 'to defraud' ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.
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> In *Welham v. Director of Public Prosecutions* [1961] AC 103, 124, Lord Radcliffe referred to a special line of cases where the person deceived is a person holding public office or a public authority and where the person deceived was not caused any pecuniary or economic loss. Forgery whereby the deceit has been accomplished, had, he pointed out, been in a number of cases treated as having been done with the intent to defraud despite the absence of pecuniary or economic loss.
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> In this case it is not necessary to decide that a conspiracy to defraud may exist even though its object was not to secure a financial advantage by inflicting an economic loss on the person at whom the conspiracy was directed. But for myself I see no reason why what was said by Lord Radcliffe in relation to forgery should not equally apply in relation to conspiracy to defraud.

In a brief speech Lord Diplock (although he, like the remainder of the appellate committee, agreed with the speech of Viscount Dilhorne) was more specific. He said (at pp. 840-1):

> (1) ...
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> (2) Where the intended victim of a 'conspiracy to defraud' is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving him of some property or right, corporeal or incorporeal, to which he is or would or might become entitled ...
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> (3) Where the intended victim of a 'conspiracy to defraud' is a person performing public duties as distinct from a private individual it is sufficient if the purpose is to cause him to act contrary to his public duty ...

With the greatest respect to Lord Diplock, their Lordships consider this categorisation to be too narrow. In their opinion, in agreement with the approach of Lord Radcliffe in *Welham*, the cases concerned with persons performing public duties are not to be regarded as a special category in the manner described by Lord Diplock, but rather as exemplifying the general principle that conspiracies to defraud are not restricted to cases of intention to cause the victim economic loss. On the contrary, they are to be understood in the broad sense described by Lord Radcliffe and Lord Denning in *Welham* - the view which Viscount Dilhorne favoured in *Scott*, as apparently did the other members of the Appellate Committee who agreed with him in that case (apart, it seems, from Lord Diplock).

With these principles in mind, their Lordships turn to *R. v. Allsop* itself [1976] 64 Cr. App. R. 29. In that case the defendant was a sub-broker for a hire purchase company. Acting in collusion with others, he entered false particulars in forms submitted to the company, to induce it to accept applications for hire purchase facilities which it might otherwise have rejected, although the defendant both expected and believed that the transactions in question would be completed satisfactorily and that the company would achieve its contemplated profit, as it appears in fact to have done. Examples of the false particulars were that the price of the car concerned would be inflated so as to allow an illusory deposit to be shown as having been paid by the intending hire-purchaser; or the value of the car taken in part exchange would be stated at more than the true figure; or a car dealer would be named as the seller when the transaction was a private one and no established car dealer played any part in it. What the defendant sought to achieve was an increase in the company's business, and therefore of his own commission. The defendant was charged with conspiracy to defraud. The Judge directed the jury that they must be sure that the conspirators knew that they were inducing the company to act in circumstances in which they might cause or create the likelihood of economic loss or prejudice. The jury convicted the defendant. He appealed on the ground that the Judge's direction was too wide; he should, it was submitted, have directed the jury that they must be sure that the defendant intended to cause economic loss to the company. The Court of Appeal dismissed the appeal. The judgment of the Court was delivered by Shaw LJ The central passage in the judgment (at p. 31) reads as follows:

> It seemed to this Court that Mr. Heald's argument traversed the shadowy region between intent and motive. Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is 'intended' only in the sense that it is a contemplated outcome of the fraud that is perpetrated. If the deceit which is employed imperils the economic interest of the person deceived, this is sufficient to constitute fraud even though in the event no actual loss is suffered and notwithstanding that the deceiver did not desire to bring about an actual loss.

In reaching this conclusion, the Court of Appeal found it necessary to reconcile it with the narrow definition of conspiracy to defraud expressed in the speech of Lord Diplock in *Scott v. Metropolitan Police Commissioner,* to which their Lordships have already referred. This they did on the basis that "economic loss" may be "ephemeral and not lasting, or potential and not actual; but even a threat of financial prejudice while it exists may be measured in terms of money". They continued (at p. 32):

> In the present case, the part of the history which is common ground reveals that in this sense [the company] did suffer actual loss for they paid too much for cars worth less than their pretended value; and they relied upon the creditworthiness of hire-purchasers as measured by the deposit stated to have been paid when none had been paid.
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> It matters not that in the end the hire-purchasers concerned paid to [the company] what was due to them. ...

They concluded by praying in aid a passage from the speech of Lord Diplock in *Hyam v. DPP* [1975] AC 55 at p. 86 - a case concerned with the mental element in the crime of murder.

In the context of conspiracy to defraud, it is necessary to bear in mind that such a conspiracy is an agreement to practise a fraud on somebody (*C.F. Welham* [1961] AC 103, 133, per Lord Denning). In the case of *Allsop,* what the defendant agreed to do was to present the company with false particulars, in reliance upon which, as he knew, the company would decide whether to enter into hire purchase transactions. It is then necessary to consider whether that could constitute a conspiracy to defraud, notwithstanding that the defendant's underlying purpose or motive was not to damage any economic interest of the company but to ensure that the transaction went through so that he that he would earn his commission. Their Lordships can see no reason why such an agreement should not be a conspiracy to defraud the company, substantially for the reasons given by the Court of Appeal. The defendant was, for his own purposes, dishonestly supplying the company with false information which persuaded it to accept risks which it would or might not have accepted if it had known the true facts. Their Lordships cannot see why this was not an agreement to practise a fraud on the company because, as Shaw LJ said, it was a dishonest agreement to employ a deceit which imperilled the economic interests of the company.

The attention of their Lordships was drawn to a critique of *Allsop* in the textbook on *Criminal Law* by Professor Smith and Professor Hogan, (6th Edn.,, at p. 273), to which they have given careful consideration. The learned authors first criticise the reference by the Court of Appeal to *R. v. Hyam.* With this criticism, their Lordships are inclined to agree, doubting whether an authority on the mental element in the crime of murder throws much light on the nature of a conspiracy to defraud. However, the Court of Appeal only felt it necessary to pray in aid Lord Diplock's speech in *Hyam* in order to circumnavigate the *dictum* of Lord Diplock in *Scott,* an exercise which their Lordships do not need to embark upon since they consider that *dictum* to be, for the reasons they have explained, too narrowly expressed. Next, the authors suggest that *Allsop* can be explained on the basis that there was an intention on the part of the defendant to defraud the company, since he intended the company to pay, as indeed it did pay, money for cars which it would not have paid, even though in the outcome it suffered no loss. There is force in this suggestion, as was recognised by the Court of Appeal itself (at p. 32 of the report). But the Court of Appeal was concerned with the question whether the conviction could stand on the basis of the summing up of the trial Judge; and their Lordships are now concerned with the correctness of the reasoning of the Court of Appeal on that question (at p. 31).

Lastly it is suggested that, on the rationalisation which the authors prefer, the case was not about recklessness, and did not decide that anything less than intention in the strict sense would suffice for conspiracy to defraud. Their Lordships are however reluctant to allow this part of the law to become enmeshed in a distinction, sometimes artificially drawn, between intention and recklessness. The question whether particular facts reveal a conspiracy to defraud depends upon what the conspirators have dishonestly agreed to do, and in particular whether they have agreed to practise a fraud on somebody. For this purpose it is enough for example that, as in *Allsop* and in the present case, the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk. It is however important in such a case, as the Court of Appeal stressed in *Allsop*, to distinguish a conspirator's intention (or immediate purpose) dishonestly to bring about such a state of affairs from his motive (or underlying purpose). The latter may be benign to the extent that he does not wish the victim or potential victim to suffer harm; but the mere fact that it is benign will not of itself prevent the agreement from constituting a conspiracy to defraud. Of course, if the conspirators were not acting dishonestly, there will have been no conspiracy to defraud; and in any event their benign purpose (if it be such) is a matter which, if they prove to be guilty, can be taken into account at the stage of sentence.

In forming this view of the matter, their Lordships draw comfort from the fact that *Allsop* has been accepted as good authority by the Supreme Court of Canada in *R. v. Olan, Hudson and Hartnett* [1978] 41 CCC (2d) 145, 150, per Dickson J (as he then was) delivering the judgment of the Court, in a passage subsequently followed by the Supreme Court of Canada in *Vezina v. R., Cote v. R.* [1986] 25 DLR (4th) 82, 96, per Lamer J (as he then was) likewise delivering the judgment of the Court.

For these reasons their Lordships, like the Court of Appeal, are satisfied that there was no misdirection by the Judge in the present case. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Also found at [1992] 1 CLJ 1

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